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In the Supreme Court of the United States

OCTOBER TERM, 1992

HAROLD E. FORD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion by declining to issue a writ of mandamus barring the district court from selecting jurors from the Eastern Division of the Western District of Tennessee, which does not include Memphis, on account of juror misconduct at petitioner's first trial in Memphis, which is in another division of same judicial district, and on account of the publicity surrounding that trial, which was primarily targeted at residents of Memphis.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unpublished, but its judgment is noted at 958 F.2d 372 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1992. A petition for rehearing was denied on April 24, 1992. The petition for a writ of certiorari was filed on June 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Harold Ford is a black United States Congressman from the Memphis, Tennessee, area. In 1987, a grand jury sitting in the Eastern District of Tennessee charged Ford and the three other petitioners with conspiracy, mail fraud, and bank fraud. The indictment charged, among other things, that the Southern Industrial Banking Corporation had made a series of "loans" to Ford with no expectation of repayment. Pet. App. 2a; Gov't C.A. Br. 1.

The case was originally investigated by a grand jury sitting in Memphis, in the Western District of Tennessee, but it was presented to a grand jury in Knoxville, in the Eastern District of Tennessee, because the government maintained that venue on all of the charges properly lay in Knoxville. Following the indictment, Ford criticized the government's handling of the case. In particular, noting that he and two of his co-defendants were from Memphis, Ford criticized the government's decision to seek an indictment in Knoxville rather than in Memphis. Pet. App. 2a.

Pursuant to petitioners' motions, a federal magistrate transferred the case from Knoxville to Memphis in accordance with Fed. R. Crim. P. 21. After the case was transferred, the government filed a motion to have the case transferred outside of Memphis, but within the Western District of Tennessee, on the ground of prejudicial pretrial publicity. The district court denied the motion. The court expressed confidence that a fair trial could be had in Memphis despite the fact that Ford was a popular local figure and the case had generated substantial publicity in the Memphis area. Pet. App. 2a-3a.

2. The trial began on February 12, 1990. When the case was ready for closing arguments, one of the jurors failed to appear. The juror later appeared and explained

that he had been arrested the night before on a traffic charge. Further questioning revealed that the juror had failed to disclose at least one prior arrest on the jury questionnaire. The juror was excused, and an alternate juror was appointed. Pet. App. 3a; Gov't C.A. Br. 5-6.

On April 24, the case was submitted to the jury. The next day, the jury announced that it had reached a verdict. But when the jury appeared in open court, the foreman stated that the jury was deadlocked. The court ordered the jury to resume deliberations. On April 27, while the jury was still deliberating, the government informed the court that it had discovered that another juror had an undisclosed prior conviction. The jury adjourned early that day, but before leaving it sent a note to the court indicating that it had taken a vote and was still deadlocked. Pet. App. 3a-4a.

A hearing was held at which the juror named by the government admitted that she had failed to disclose two prior felonies on the jury questionnaire. The court dismissed the juror and then inquired into the jury's deadlock. The foreman said that the jury could not reach agreement. The court polled the jury, and all of the jurors agreed that they were deadlocked. The court then declared a mistrial. It cited the deadlock, the prior juror misconduct, and allegations of improper juror contact and attempts to influence the jury. Pet. App. 4a-5a.

After the mistrial, the FBI conducted an investigation of the allegations of juror misconduct. The affidavit of the special agent who conducted the investigation indicated that in addition to the problems associated with the two dismissed jurors, another juror had slept in the jury room, had received news information about the case during a break in deliberations, and had been approached by two women who tried to influence her. The jury foreman declined to answer whether he had made up his mind about the case prior to the deliberations, and also refused

to say whether he thought the case was the product of a vendetta against Ford. Pet. App. 5a.

3. At a hearing on September 27, 1990, the district court posed the question whether, in light of the publicity surrounding the first trial and the repeated instances of jury misconduct, petitioner would receive a fair trial from a jury selected from the Memphis area. Petitioner objected to the court's comments and accused it of implying that blacks in Memphis were incapable of judging the case fairly. The following exchange occurred:

> THE COURT: I didn't say they were incapable, I'm not speaking about their being incapable. I'm speaking in terms of whether there is a willingness, whether it just simply can be done.
>
> * * * * *
>
> MR. McDANIELS: You know—there has been a lot of taking the names in vain of a lot of people here. That is one of the objections that I have to this piece of paper, but whether you call it ability or willingness, I reject that black citizens in 1990 —
>
> THE COURT: Well, I'm not going to let any lawyer come in here and paint me with a brush and give the impression that I am sitting here saying that black people can't be fair. * * * I'm not saying that, and I'm not going to sit by and let you or any other lawyer interpret what I say in that way.
>
> All I am saying is, is it possible. Willingness, intelligence, education, I'm not talking about that. Is it possible in Memphis, given the current situation, for a fair jury to be selected to try this case. And I don't want to be misinterpreted, I've been silent too long in many of these instances. * * * But I at least want

> us to discuss the issues without misinterpreting what I'm saying.

Pet. App. 40a-42a.[1]

The government proposed, among other things, that the case be transferred within the district to avoid the effect of the publicity that had surrounded the first trial. On April 10, 1991, in response to the government's motion, the district court stated that the retrial would take place in Memphis, but it directed that jury selection take place in Jackson, in the Eastern Division of the Western District of Tennessee. The court gave five reasons for its decision:

> (1) The initial trial of this case was covered day to day by an avalanche of television, radio and newspaper publicity. While this barrage of publicity could be seen, heard and read outside of the Western Division of this district, the publicity was primarily targeted to people living in the Memphis, Tennessee area.
>
> (2) There were strong indications of juror contact with outside persons or sources during the initial trial. Contact with or by jurors and outside person(s) or sources should be substantially minimized. This is because, in the Court's judgment, Eastern Division jurors will probably be, for the most part, generally unknown in Memphis, Tennessee.
>
> (3) Some persons attending the initial trial often expressed their displeasure with rulings by the Court vocally and/or with their feet. These persons often vocally expressed their support of the defense. The overall conduct of such persons was not only dis-

[1] Judge Horton, a black man, has had a long and distinguished record supporting and advancing civil rights for blacks.

courteous but at times disorderly. Discourteous and disorderly conduct by persons attending the trial attempting to openly influence the jury should be of substantially less effect on jurors chosen from the Eastern Division of this district.

(4) Two known jurors gave false and/or incomplete answers to questions asked of them during voir dire touching on their qualifications to serve as jurors.

(5) After trial, interviews with jurors by the FBI showed that possibly two jurors were unwilling to follow the law of the case—even after they faithfully promised to do so when questioned during the jury selection process. This type of conduct should not be a factor if jurors are selected from the Eastern Division of the district.

Pet. App. 35a-37a. The district court also denied petitioners' motion to dismiss the indictment on double jeopardy grounds. *Id.* at 15a-25a.

4. Petitioner Harold Ford then sought a writ of mandamus from the court of appeals to compel the district court to conduct jury selection in Memphis. The court of appeals denied the request. Noting that mandamus is an extraordinary remedy, the court held that petitioner had not shown that the district court had abused its discretion by ordering the intradistrict transfer of the case for jury selection. The court stated further that petitioner had an alternative method of relief because he could raise the intradistrict transfer issue on appeal in the event of a conviction. The court also held that review by way of mandamus was not proper with respect to petitioner's claim that the district court improperly considered the FBI affidavit relating to the juror interviews, because the court of appeals could not order the district court to refrain from doing what it had already done. The court

added that petitioner's claim concerning the FBI affidavit could be raised on direct appeal if the second trial resulted in a conviction. Pet. App. 11a-14a.[2]

ARGUMENT

Petitioners contend that the court of appeals erred by declining to issue a writ of mandamus ordering the district court not to select the jury in the Eastern Division of the Western District of Tennessee. Review is not warranted at this time.

1. Petitioners' challenge to the court of appeals' decision is not ripe for review by this Court. As a consequence of the court of appeals' decision, the case will be tried on the merits. The decision of the court of appeals thus places petitioners in the same position they occupied when the district court granted the government's motion to conduct jury selection in the Eastern Division of the District instead of the Western Division. If petitioners are acquitted following a trial on the merits, their contention will be moot. If they are convicted and their convictions are affirmed on appeal, petitioners will be able to present their claims regarding the intradistrict transfer issue to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, there is no need for this Court to review the merits of petitioners' claim at this time.

2. a. The court of appeals did not abuse its discretion by declining to issue the writ of mandamus requested by petitioners. Mandamus is an extraordinary remedy that is appropriate only if a lower court has clearly abused its discretion or exceeded its authority. The petitioner

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[2] The court of appeals also held that petitioners' retrial was not barred by double jeopardy, concluding that there was a manifest necessity for the declaration of a mistrial. Pet. App. 6a-11a. Petitioners do not challenge that ruling.

must have no other means of relief and he must show that he has a clear and undisputed right to the relief he seeks. See, *e.g.*, *Mallard* v. *United States District Court*, 490 U.S. 296, 308-309 (1989); *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403 (1976). Petitioners in this case have another avenue of relief, since they may obtain review of the district court's ruling on appeal from a conviction. The court of appeals' decision not to issue a writ of mandamus therefore should not be disturbed.

In any event, petitioners have not demonstrated any right to the relief they seek, much less a clear and undisputed right. Although the Sixth Amendment requires a trial in the district in which the offense was committed, it does not require a trial in a particular division of the district. *Humphrey* v. *United States*, 896 F.2d 1066, 1068-1069 (7th Cir.), cert. denied, 111 S. Ct. 342 (1990); *United States* v. *Young*, 618 F.2d 1281, 1288 (8th Cir.), cert. denied, 449 U.S. 844 (1980). A district court does not violate Fed. R. Crim. P. 18, which requires a district court to fix the place for trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice, by ordering an intradistrict transfer of the case to avoid prejudicial publicity. See *Humphrey* v. *United States*, 896 F.2d at 1068-1069; *United States* v. *Weddell*, 800 F.2d 1404, 1406 (5th Cir. 1986); *United States* v. *Mase*, 556 F.2d 671, 675-676 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978); *United States* v. *James*, 528 F.2d 999, 1021-1022 (5th Cir.), cert. denied, 429 U.S. 959 (1976). That is particularly so after the first trial has ended in a hung jury. See *United States* v. *Lewis*, 504 F.2d 92, 96-99 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975); *United States* v. *Clark*, 416 F.2d 63, 64 (9th Cir. 1969). Thus, in *United States* v. *Balistrieri*, 778 F.2d 1226 (7th Cir. 1985), cert. denied, 477 U.S. 908 (1986), the court of appeals held that

the district court did not violate Fed. R. Crim. P. 18 by ordering the intradistrict transfer of the case for jury selection following extensive pretrial publicity in a related case. In *Balistrieri*, the court emphasized that the only inconvenience to the defendant was that the venire did not include jurors from the division in which the trial was being held, and it added that the jury was not required to be selected either from throughout the entire district or from the division in which the crime was committed. 778 F.2d at 1229.[3]

Petitioners' further argument, Pet. 18-24, that the district court improperly ordered the transfer because the judge believed that blacks in Memphis could not serve as fair and impartial jurors at the retrial is also meritless. The district court ordered the intradistrict transfer because of the extensive pretrial publicity, which was fo-

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[3] Petitioners incorrectly contend, Pet. 17-18, that the intradistrict transfer order violated the Jury Selection and Service Act of 1968, which declares that "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. 1861. First, the policy declaration in Section 1861 does not provide an independent ground for relief. See *United States* v. *Gometz*, 730 F.2d 475, 479-480 (7th Cir.) (en banc), cert. denied, 469 U.S. 845 (1984). Second, the order at issue in this case does not offend the policy declared in Section 1861. The place within the district where the court convened was selected simply for the convenience of all the participants; the court could have moved the trial to the Eastern Division without violating any right of petitioners. Regardless of where the court chose to conduct the proceedings, the statutory purpose of having the jury drawn from a fair cross-section of an entire district or an entire division within a district would be satisfied in either case. The court in *United States* v. *Cates*, 485 F.2d 26 (1st Cir. 1974), did not hold to the contrary. The court in *Cates* simply held that the return of an indictment in a division different from the one in which the crime occurred did not violate the Act.

cused on Memphis, and on account of the repeated instances of juror misconduct at the first trial, not because of racial considerations. Contrary to petitioners' contention, the district court did not state that black jurors in Memphis would be incapable of judging the case fairly. Indeed, the district court specifically rejected the effort of counsel for Ford to construe the court's comments in that manner. In short, petitioners' argument that the court transferred the case for racial reasons is not supported by the record.[4]

b. Petitioners allege that various aspects of the court of appeals' decision in this case conflict with decisions of other circuits. There is no merit to those contentions. In this regard, it should be noted that petitioners make no claim that any court of appeals has held that it is improper to select a jury from another division within the same judicial district, and we are aware of no such case. Of course, petitioners cite no case supporting their contention that the issuance of a writ of mandamus is appropriate to overturn such an order.

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[4] Petitioners contend, Pet. 24-25, that the district court's consideration of the FBI report concerning the instances of juror misconduct at the first trial violated Fed. R. Evid. 606(b). But Rule 606(b) provides that jurors may not testify with respect to certain matters regarding "the validity of a verdict," and the first jury returned no verdict. Contrary to petitioners' claim, the Second Circuit did not hold to the contrary in *United States* v. *MacQueen*, 596 F.2d 76 (1979). The court held in that case that it would not be proper to "impeach" a mistrial by concluding that "the jurors at the first trial had secretly acquitted [the defendant], though they announced in open court that they were deadlocked." *Id.* at 83. The government does not seek to "impeach" the mistrial that was declared following petitioners' initial trial. Moreover, the Second Circuit recognized that juror testimony regarding "impermissible outside influences" is permissible, *ibid.*, and the FBI investigation was directed in major part at determining whether any such outside contacts occurred.

Petitioners' contention, Pet. 25-26, that mandamus is proper to challenge the improper transfer of a case from one judicial district to another is beside the point. No interdistrict transfer is involved in this case. The jury selection and trial of petitioners' case will take place in the district where the offense occurred, thereby satisfying the venue requirements of both the Sixth Amendment and Fed. R. Crim. P. 18. Because petitioners have no right to a trial in any particular division of a district, they are not entitled to mandamus to challenge the intradistrict transfer of their case for jury selection.

Petitioners' reliance, Pet. 16-17, on this Court's decision in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964), also is misplaced because that case did not involve an intradistrict transfer. Moreover, in *Platt*, after the court of appeals issued a writ of mandamus ordering an interdistrict transfer, this Court reversed, holding that the court of appeals had acted improperly by examining the issue de novo and exercising the discretion that Fed. R. Crim. P. 21 assigns the district court. 376 U.S. at 244-245.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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